IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 194 OF 2004

Mrs. Maria Sibilia Crasto,
major, r/o H.No.7/15,
Sauntavaddo, Calangute,
Bardez, Goa. ... Petitioner

Versus

1. Mr. Luis Antonio Jose Sarto
Pires, s/o Antonio Jose
Francisco Caetano Pires,
major, r/o Sauntavaddo,
Calangute, Bardez, Goa,

2. Mr. Antonio Fernandes,
major, r/o House No.7/15- A,
Sauntavaddo, Calangute,
Bardez, Goa and

3. Mrs.Antonio Fernandes, major,
r/o House No.7/15- A.,
Sauntavaddo, Calangute,
Bardez, Goa. ...Respondents.

Mr. D. V. Patkar, advocate for the petitioner.

Mr. T. Furtado, advocate for the respondents.

Respondent nos.2 and 3 served, absent.

CORAM : A. P. LAVANDE, J.

DATE : 22nd March, 2005.

ORAL JUDGMENT

By this petition the petitioner takes exception to Order

dated 4th March, 2004, dismissing the application filed by the petitioner under Order 1 Rue 10 C.P.C., to add her as party to Regular Civil Suit No.30/03/A pending before the Court of the Civil Judge, Junior Division at Mapusa. Briefly, the facts which are relevant for the disposal of this petitioner are as under:-

On 27th January, 2003, respondent no.1 filed Regular Civil Suit No.30/03/A in the Court of the Civil Judge, Junior Division, Mapusa, against Isabella Fernandes and respondent nos.2 and 3 alleging that the said Isabella, her mundkar in respect of house bearing no.7/15 had made certain extensions to the said house, without purchasing the same under the Goa Mundkars (Protection From Eviction) Act, 1975 (hereinafter referred to as "the Act"). During the pendency of the suit, the said Isabella expired on 4th August, 2003, leaving behind two sons, respondent no.2 herein and one Assis Fernandes and the petitioner herein, who is her daughter. According to the learned counsel appearing for respondent no.1, the said Isabella has one more daughter. On 15th September, 2003, respondent no.1 made an application to bring the said Assis Fernandes on record as the legal representative of the deceased Isabella. Since the petitioner was not shown as the legal representative of the deceased Isabella, the petitioner filed an application under Order 1 Rule 10(2) C.P.C., seeking to get herself impleaded in the suit as defendant. The application was opposed

by respondent no.1. After hearing both sides, the learned Civil Judge, Junior Division, Mapusa, vide Order dated 4th March, 2004, which is impugned in the present petition, dismissed the application filed by the petitioner.

2. Mr. Patkar, learned counsel appearing for the petitioner, submitted that the impugned Order discloses error of law apparent on the face of the record and, therefore, this is a fit case in which this Court in exercise of powers under Article 227 of the Constitution should set aside the impugned Order. According to the learned counsel the trial Court has not considered Section 3 of the Act. According to the learned counsel the petitioner is a necessary party in the said suit since the respondent no.1 has sought demolition of part of the house in respect of which the deceased Isabella was admittedly a mundkar. The learned counsel further submitted that the petitioner being the daughter of the said Isabella has direct interest in the suit property and on that count she is a necessary party in the said suit and, therefore, the trial Court has not exercised jurisdiction according to law while passing the impugned Order. According to the learned counsel, having regard to the application filed by the petitioner it is clear that the petitioner is residing in the suit house, a portion of which is sought to be demolished by filing the suit by respondent no.1 and, therefore, the petitioner is a necessary party in the said suit. According to the learned

counsel, reliance placed by the trial Court on Section 2(n) of the Act to arrive at a finding that since the petitioner is a married daughter of deceased Isabella, she cannot be impleaded in the suit, is totally misplaced.

3. Per Contra, Mr. Furtado, learned counsel appearing for respondent no.1, submitted that no fault could be found with the impugned Order inasmuch as the trial Court has exercised jurisdiction in accordance with law. According to the learned counsel respondent no.1, who is the plaintiff in the said suit is entitled to implead only those defendants against whom he wants to seek relief. Relying upon the rule of *dominus litus* the learned counsel submitted that the trial Court is absolutely right in rejecting the application filed by the petitioner for impleadment. According to the learned counsel, the petitioner is not residing in the suit house and in any event, being a married daughter of the deceased Isabella she is not entitled to claim any right in respect of the suit house, she being not a member of the family in terms of Section 2(n) of the Act. Placing reliance on Sections 2(p) and 2(n) of the Act, the learned counsel submitted that the married daughter cannot claim any right in respect of mundkarial house. According to the learned counsel, Section 3 of the Act is clearly not attracted in the present case and upon harmonious reading of Sections 3 and 2(n) and 2(p) of the Act, it is clear that a married daughter of a mundkar has absolutely no

right in the mundkarial house.

4. I have considered the submissions made by the learned counsel for the parties. The question which arises for consideration in the present petition is whether the impugned Order discloses error of law apparent on the face of the record. The trial Court while dismissing the application has placed reliance on Section 2(n) of the Act and has held that a married daughter being not a member of the family as defined in Section 2(n) of the Act, is not covered under the definition of member of the family under the Act and, as such, the petitioner could not be impleaded as a party in the said suit. At this stage, it would be appropriate to reproduce Section 3 of the Act. It reads as under:-

> "S.3. *Rights of a mundkar to be heritable* -
> The rights of a mundkar in his dwelling house shall be heritable and shall not be transferable."

5. A bare reading of Section 3 of the Act reveals that the rights of a mundkar in a dwelling house are heritable but not transferable. In the present case, the respondent no.1 seeks demolition of a part of the house which, according to him, has been illegally extended. Having regard to the reliefs claimed in the suit, it is clear that it cannot be said that the petitioner has absolutely no interest in the subject-matter of the suit. Even if the argument of Mr. Furtado, learned

counsel for respondent no.1, is accepted that the petitioner not being a member of the family as defined in Section 2(n) of the Act, she is not entitled to claim possession in respect of the suit house, the fact remains that as the legal representative of the deceased Isabella she has some interest in the suit house in respect of which deceased Isabella was admittedly a mundkar. At the stage of deciding an application under Order 1 Rule 10 C.P.C. the Court has to consider prima facie, whether the party who seeks impleadment in the suit has some direct interest in the suit property. At that stage the Court has not to adjudicate as to what are the rights which ultimately the party is going to get in the suit. If the party who seeks impleadment, prima facie, establishes that he has some direct interest in the suit property, the application of such a party for impleadment under Order 1 Rule 10 C.P.C. cannot be rejected. I am unable to accept the submission of Mr. Furtado that Section 3 is not at all attracted in the present case. Even upon harmonious reading of Sections 3 and 2 (n) and (p) of the Act, it cannot be said that section 3 is not attracted in the present case. The fact remains that it is the case of respondent no.1 himself that the defendants have extended the mundkarial house illegally without purchasing the same. If the trial court passes the decree in favour of the plaintiff, the same will have effect on the rights of the petitioner since she is entitled to inherit mundkarial rights alongwith others who are

entitled to succeed to the estate of the deceased Isabella. That being the position, I find considerable force in the submission of Mr. Patkar that the trial Court has exercised jurisdiction illegally in rejecting the application filed by the petitioner for impleadment. Needless to mention that the concept of *dominus litus* is not an absolute concept and if the court comes to the conclusion that a party is either a necessary or proper party, an application made by such a party for impleadment ought to be allowed by the Court. Having regard to the nature of the controversy involved in the suit, it is clear that the presence of the petitioner is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. I am, therefore, of the view that the impugned Order discloses an error of law apparent on the face of the record and, therefore, interference is called for by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. It is made clear that I have not given any findings on merits about the rights of the petitioner and the trial Court shall decide the suit on its merits in accordance with law on the basis of evidence that will be led by the parties.

6. In view of the above discussion, the petition is allowed. The impugned Order dated 4th March, 2004 is set aside and the application for impleadment filed by the petitioner is allowed. Rule is made absolute in the aforesaid terms. Having regard to the facts and

circumstances of the case, the parties are directed to bear their own costs.

A. P. LAVANDE, J.

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